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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
10 **(HONORABLE JANIS L. SAMMARTINO)**

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 v.

14 TONY McLEOD,

15 Defendant.  
16

Case No. 13CR2297-JLS

DATE: August 30, 2013  
TIME: 10:30 a.m.

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANT'S MOTIONS**

17 **1. Statement of Facts.**

18 On June 11, 2013, Mr. McLeod was arrested in the Tampa International Airport  
19 along with MV#1.<sup>1</sup> On June 10, 2013, Escondido Police Department responded to a  
20 report of a missing child, later identified as MV#1. Officers searched MV#1's cellular  
21 telephone and determined that MV#1 was communicating with an individual saved in  
22 the phone as "Tony." Sexual images are alleged to have been by "Tony" to MV#1's  
23 cellular phone. Further investigation revealed that the phone number saved under  
24 "Tony" in the phone belonged to Mr. McLeod. Additional information revealed that  
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27 Pursuant to the Protective Order of this Court, Mr. McLeod will use the term Minor Victim  
#1 or MV#1 to protect the identity of the juvenile at issue in this case.

1 Mr. McLeod's phone was in the vicinity of the Los Angeles Airport and that Mr. McLeod  
2 and an individual identified as "Justin McLeod" had boarded a plane to Tampa, Florida  
3 that day. Law enforcement officers arrested Mr. McLeod shortly after the plane landed  
4 at the Tampa Airport. Mr. McLeod was interrogated after his arrest. He initially agreed  
5 to speak with agents, and later invoked his rights under *Miranda*.

6 A warrant was issued from the Southern District of California on June 17, 2013.  
7 Mr. McLeod was arrested on the warrant. An indictment was filed in the case on June  
8 21, 2013, charging Mr. McLeod with one count of Enticement of a Minor in violation of  
9 18 U.S.C. §2422(b). Mr. McLeod was arraigned on the indictment in Tampa, waived his  
10 right to a removal and identification hearing and was transferred to San Diego. Mr.  
11 McLeod first appeared in this district on July 26, 2013.

12 Through counsel a protective order was agreed to and issued on August 9, 2013,  
13 and discovery has been produced on a rolling basis since that time. Discovery in this  
14 case is voluminous, included extensive phone records, interviews and other electronic  
15 material. Government counsel has indicated that the investigation is still ongoing and  
16 additional charges may be filed.

17 These motions follow.

18 **2. Motion to Compel Discovery.**

19 Mr. McLeod moves for the production of the following discovery as he believes  
20 that the government has not provided all required discovery in this case. This request  
21 includes not only items known to the government, but also items in the custody,  
22 control, care, or knowledge of any "closely related investigative [or other] agencies,"  
23 *United States v. Bryan*, 868 F. 2d 1023 (9<sup>th</sup> Cir. 1989), as well as items of which the  
24 government attorney may become aware through the exercise of due diligence. *See*  
25 Fed. R. Crim. P. 16.

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1           **2.1 Mr. McLeod Statements.**

2           Mr. McLeod specifically requests all written or recorded statements made by  
3 him; all written, audiotaped, or videotaped records of any of her statements; the  
4 substance of all her oral statements; and all rough notes pertaining to her statements  
5 or the substance of her statements. *See* Fed. R. Crim. P. 16(a)(1)(A) & (B); *Brady v.*  
6 *Maryland*, 373 U.S. 83 (1963).

7           **2.2 Arrest Reports, Notes and Dispatch Tapes.**

8           The government must produce all arrest reports, investigator's notes,  
9 memoranda from arresting officers, dispatch tapes, sworn statements, TECS records,  
10 and prosecution reports pertaining to Mr. McLeod. *See* Fed. R. Crim. P. 16(a)(1)(B) &  
11 (E); Fed. R. Crim. P. 26.2; Fed. R. Crim. P. 12(h); *Brady v. Maryland*, 373 U.S. 83 (1963).  
12 Mr. McLeod includes in this request the Report of Investigation ("ROI"), any redacted  
13 portions of the ROIs and any subsequent ROIs that the case agent or any other agent  
14 has written. Mr. McLeod also requests any notes made after any cell phone was  
15 searched.

16           **2.3 Brady Material.**

17           Mr. McLeod requests all documents, statements, agents' reports, and tangible  
18 evidence that is favorable to him on the issue of guilt or penalty, and/or that affects the  
19 credibility of the government's witnesses and the government's case. *See Brady*, 373  
20 U.S. at 88; *United States v. Bagley*, 473 U.S. 667, 676-77 (1985). This request includes  
21 any information that may result in a lower sentence under the advisory Guidelines or  
22 a variance under 18 U.S.C. § 3553(a), including any cooperation or attempted  
23 cooperation by Mr. McLeod and any information that could affect any base offense  
24 level, specific offense characteristic, adjustments, enhancement, departure, or criminal  
25 history determination under the Guidelines.

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1           **2.4 Mr. McLeod's Prior Record.**

2           Mr. McLeod request disclosure of his prior record. *See* Fed. R. Crim. P.  
3 16(a)(1)(D).

4           **2.5 Any Proposed 404(b) or 6 R09 Evidence.**

5           Mr. McLeod requests evidence of prior similar acts or convictions. *See* Fed. R.  
6 Crim. P. 16(a)(1)(D); Fed. R. Evid. 404(b); Fed. R. Evid. 609. Sufficient notice requires  
7 the government to “articulate **precisely** the evidential hypothesis by which a fact of  
8 consequence may be inferred from other acts evidence.” *United States v. Mehrmanesh*,  
9 689 F.2d 822, 830 (9<sup>th</sup> Cir. 1982) (emphasis added; internal citations omitted); *see also*  
10 *United States v. Brooke*, 4 F.3d 1480, 1483 (9<sup>th</sup> Cir. 1993) (reaffirming *Mehrmanesh* and  
11 reversing convictions).

12           This request includes and “TECS” records (records of prior border crossings) that  
13 the Government intends to introduce at trial, whether in its case-in-chief,  
14 impeachment, or rebuttal. *United States v. Vega*, 188 F. 3d 1150, 1154-55 (9<sup>th</sup> Cir.  
15 1999). Although there is nothing intrinsically improper about prior border crossings,  
16 they are nonetheless subject to 404(b), as they are “other acts” evidence that the  
17 Government must produce before trial. *Id.*

18           Mr. McLeod requests, in accordance with Rule 404(b), that notice be given at  
19 least three weeks before trial to provide the defense with adequate time to investigate  
20 and prepare for trial.

21           **2.6 Evidence Seized.**

22           Mr. McLeod requests production of any evidence seized from him, whether or not  
23 it was obtained from a search with or without a warrant. *See* Fed. R. Crim. P.  
24 16(a)(1)(E).

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## 2.7 Request for Preservation of Evidence.

Mr. McLeod specifically requests the preservation of all physical evidence that may be destroyed, lost, or otherwise put out of the possession, custody, or care of the government and that relates to the arrest or the events leading to the arrest in this case. This request includes, but is not limited to, rough notes, dispatch tapes, video or audiotapes of the checkpoint, the results of any fingerprint analysis, Mr. McLeod's personal effects, and any evidence seized from Mr. McLeod or any third party in relation to this case. This request also includes any material or percipient witnesses who might be deported or otherwise likely to become unavailable (e.g., undocumented aliens and transients). Mr. McLeod requests that the prosecutor be ordered to question all the agencies and individuals involved in the prosecution and investigation of this case to determine if such evidence exists, and if it does exist, to inform those parties to preserve any such evidence.

## 2.8 Henthorn Material.

Mr. McLeod requests that the Assistant United States Attorney assigned to this case oversee (not personally conduct) a review of all personnel files of each agent involved in the present case for impeachment material. *See Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Henthorn*, 931 F.d 29 (9<sup>th</sup> Cir. 1991). This request includes, but is not limited to, any complaints filed against the agent (by a member of the public, by another agent, or any other person), whether or not the investigating authority has taken any action, as well as any matter for which a disciplinary review was undertaken, whether or not any disciplinary action was ultimately recommended.

## 2.9 Tangible Objects.

Mr. McLeod requests the opportunity to inspect, copy, and test, as necessary, all other documents and tangible objects, including photographs, books, papers, documents, fingerprint analyses, vehicles, or copies of portions thereof, that are material to the defense or intended for use in the government's case-in-chief or were

1 obtained from or belong to Mr. McLeod. *See* Fed. R. Crim. P. 16(a)(1)(F). Mr. McLeod  
2 requests color copies of all photographs in this case in the government's possession.

### 3 **2.10 Expert Witnesses.**

4 Mr. McLeod requests the name, qualifications, and a written summary of the  
5 testimony of any person that the government intends to call as an expert witness  
6 during its case-in-chief. This summary should include a description of the witness's  
7 opinion(s), as well as the basis and the reasons for the opinion(s). This request  
8 includes, but is not limited to, disclosure of the qualifications of any government  
9 witness who will testify that he or she understands and/or speaks Spanish or any other  
10 foreign language that may have been used during the course of an interview with the  
11 defendant or any other witness. The defense requests that notice of expert testimony  
12 be provided at least three weeks before trial so that the defense can properly prepare  
13 to address and respond to this testimony, including obtaining its own expert and/or  
14 investigating the opinions and credentials of the government's expert. The defense  
15 also requests a hearing in advance of trial to determine the admissibility of  
16 qualifications of any expert. *See Kumho v. Carmichael Tire Co.*, 526 U.S. 137 (1999).

### 17 **2.11 Evidence of Bias or Motive to Lie.**

18 Mr. McLeod requests any evidence that any prospective government witness is  
19 biased or prejudiced against the defendant, or has a motive to falsify or distort his or  
20 her testimony.

### 21 **2.12 Impeachment Evidence.**

22 Mr. McLeod requests any evidence that any prospective government witness has  
23 engaged in any criminal act, whether or not resulting in a conviction, and evidence of  
24 any witness statement favorable to Mr. McLeod. *See* Fed. R. Evid. 608, 609 & 613;  
25 *Brady v. Maryland*, 373 U.S. 83 (1963). Mr. McLeod further requests any evidence that  
26 any prospective witness is under investigation by federal, state or local authorities for  
27 any criminal conduct. Mr. McLeod further requests any evidence, including any

1 medical or psychiatric report or evaluation, that tends to show that any prospective  
2 witness' ability to perceive, remember, communicate, or tell the truth is impaired, and  
3 any evidence that a witness has ever used narcotics or other controlled substance, or  
4 has ever been an alcoholic.

### 5 **2.13 Witness Addresses.**

6 Mr. McLeod requests the name and last known address of each prospective  
7 government witness. Mr. McLeod also requests the name and last known address of  
8 every witness to the crime or crimes charged (or any overt acts committed in  
9 furtherance thereof) who will **not** be called as a government witness.

### 10 **2.14 Names of Witnesses Favorable to Mr. McLeod.**

11 Mr. McLeod requests the name and last known address of any witness who made  
12 any arguably favorable statement concerning him, could not identify him, or was  
13 unsure of his identity or participation in the crime charged.

### 14 **2.15 Statements Relevant to the Defense.**

15 Mr. McLeod requests disclosure of any statement relevant to any possible  
16 defense or contention that he might assert in his defense.

### 17 **2.16 Jencks Act Material.**

18 Mr. McLeod requests production in advance of motion hearing or trial of all  
19 material, including any tapes, which the government must produce pursuant to the  
20 Jencks Act. 18 U.S.C. § 3500; Fed. R. Crim. P. 26.2. This requests includes interview  
21 notes if such notes were reviewed with the subject. *See United States v. Boshell*, 952  
22 F.2d 1101 (9<sup>th</sup> Cir. 1991). Advance production will avoid the possibility of delay at trial  
23 to allow the defense to investigate the Jencks material.

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1           **2.17 Giglio Information and Agreements Between the Government and**  
2 **Witnesses.**

3           Mr. McLeod requests all statements and/or promises, express or implied, made  
4 to any witness in exchange for his or her testimony in this case, and all other  
5 information which could arguably be used for the impeachment of any government  
6 witnesses. *See Giglio v. United States*, 405 U.S. 150 (1972). This request includes  
7 identification of any cooperating witnesses who have committed crimes, but were not  
8 charged, so that they may testify for the government in this case. The request also  
9 includes any express or implicit promise, understanding, offer of immunity, past,  
10 present, or future compensation, or any other kind of agreement or understanding,  
11 including any implicit understanding relating to criminal or civil income tax, forfeiture  
12 or fine liability between any prospective government witness and the government  
13 (federal, state and/or local). This request also includes any discussion with a potential  
14 witness about, or advice concerning any contemplated prosecution, or any possible  
15 plea bargain, even if no bargain was made, or the advice not followed and specifically  
16 includes any discussion with a potential witness regarding that witness's immigration  
17 status and/or any effect that the witness's statements or lack thereof might have on  
18 that status, including the granting or revoking of such immigration status or any other  
19 immigration status, including but not limited to citizenship, nationality, a green card,  
20 border crossing card, parole letter, bond status, or permission to remain in the United  
21 States.

22           **2.18 Informants and Cooperating Witnesses.**

23           Mr. McLeod requests disclosure of the names and addresses of all informants or  
24 cooperating witnesses who have been used or will be used in this case, and in  
25 particular, disclosure of any informant who was a percipient witness in this case or  
26 otherwise participated in the crime charged against Mr. McLeod. The government  
27 must disclose the informant's identity and location, as well as the existence of any



1 other percipient witness unknown or unknowable to the defense. *Roviaro v.*  
2 *United States*, 353 U.S. 53, 61-62 (1957). The government must also disclose any  
3 information derived from informants which exculpates or tends to exculpate Mr.  
4 McLeod. Mr. McLeod further requests disclosure of any information indicating bias on  
5 the part of any informant or cooperating witness, including but not limited to any  
6 inducements, favors, payments or threats made to the witness in order to secure  
7 cooperation with the authorities. *See Giglio v. United States*, 405 U.S. 150 (1972).

### 8 **2.19 Performance Goals and Policy Awards.**

9 Mr. McLeod requests disclosure of information regarding standards used for  
10 measuring, compensating or reprimanding the conduct of all law enforcement officers  
11 involved in this case to the extent such information relates to the seizure of narcotics.  
12 This request specifically includes information concerning performance goals and policy  
13 awards as well as the standards used by the Department of Homeland Security for  
14 commending, demoting, or promoting agents for their work with drug interdiction.

### 15 **2.20 Reports of Scientific Tests or Examinations.**

16 Mr. McLeod requests the reports of all scientific or other tests or examinations  
17 conducted upon the evidence in this case. *See Fed. R. Crim. P. 16(a)(1)(F)*.

### 18 **2.21 Residual Request.**

19 Mr. McLeod intends, by this discovery motion, to invoke his rights to discovery  
20 to the fullest extent possible under the Federal Rules of Criminal Procedure and the  
21 Constitution and laws of the United States. Mr. McLeod requests that the government  
22 provide his attorney with the above-requested material sufficiently in advance of trial  
23 to avoid unnecessary delay prior to cross-examination.

## 24 **3. This Court Should Order Preservation and Viewing of Evidence.**

25 Mr. McLeod requests the preservation of all physical evidence in this case. This  
26 includes any evidence that may be destroyed, lost, or otherwise put out of the  
27 possession, custody, or care of the Government (or its private contractors) in this case.

1 *United States v. Riley*, 189 F.3d 802, 806-08 (9<sup>th</sup> Cir. 1999). This request includes, but  
2 is not limited to: (1) the results of any fingerprint analysis; (2) the defendant's  
3 personal effects; (3) the agents' rough notes; (4) any radio broadcast or other audio,  
4 if it is recorded; (5) any evidence seized from the defendant or any third party (i.e.,  
5 material witnesses, co-defendants); (6) any alleged contraband seized in this case.

6 Additionally, Mr. McLeod hereby requests an opportunity to view, photograph,  
7 and weigh the contraband allegedly confiscated in this case. Additionally, Mr. McLeod  
8 wishes to view the cell phones and vehicles seized in this case.

9 It is requested that the prosecutor be ordered to question all the agencies,  
10 private contractors, and individuals involved in the prosecution and investigation of  
11 this case to determine if such evidence exists, and if it does exist, to inform those  
12 parties to preserve any such evidence.

13 **4. This Court Should Grant Leave to File Further Motions.**

14 Mr. McLeod has received limited discovery in this case. Accordingly, Mr. McLeod  
15 requests leave to file further motions as are warranted by the additional discovery.

16 **5. Conclusion.**

17 For the reasons stated above, Mr. McLeod respectfully requests that the Court  
18 grant the above motions.

19 Respectfully submitted,

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21 DATED: August 28, 2013

*s/ Leila W. Morgan*

**LEILA W. MORGAN**

Federal Defenders of San Diego, Inc.  
Attorneys for Tony McLeod